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No.

Supreme Court, U.S.
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In The

Supreme Court Of The United States

OCTOBER TERM, 1985

VERNICE DUBOSE, ET AL.,
Petitioners,

v.

SAMUEL R. PIERCE, JR., SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether in overturning an award of attorney's fees of $141,705 under the Equal Access to Justice Act, the court of appeals erred by reviewing *de novo* and reversing the district court's finding that the federal government's position on the merits was not "substantially justified."

2. Whether the Supreme Court's issuance of a stay and grants of certiorari without opinion in other closely related cases was a sufficient basis for the court of appeals to reverse the district court's finding that the federal government's position on the merits was not "substantially justified" when that position had previously been unanimously rejected by the district court along with many other courts nationwide and the eventual settlement on the merits awarded the petitioners all that they sought in the litigation.

LIST OF PARTIES IN THE COURT BELOW

VERNICE DUBOSE, SUSAN DAIGLE, individually and on behalf of all others similarly situated,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; WINDHAM HEIGHTS ASSOCIATES, a limited partnership; ANTHONY ASSOCIATES, a general partnership; and SIMON KONOVER, individually and in his official capacity as a general partner in Windham Heights Associates and Anthony Associates,
Respondents.

CLAUDIA WALTER and DOMINICK CORTESE, individually and on behalf of all other persons similarly situated;

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; CARABETTA ENTERPRISES, INC., a corporation organized and existing under the laws of the State of

Connecticut, located in the Town of Meriden, County of New Haven, State of Connecticut,

Respondents.

JANETTE LITTLE, individually and on behalf of all others similarly situated;

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,

Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; RICHARD BROWN, individually and in his capacity as part-owner of East Hartford Estates; OAK MANAGEMENT CO., INC., a Connecticut Corporation; LOUIS BROWN, individually and in his capacity as part-owner of East Hartford Estates,

Respondents.

CATHY ADAMS, SHEILA CAQETTE, BARBARA LITTLEJOHN and HAZEL FRENCH, individually and on behalf of all others similarly situated;

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,

Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; BRANFORD MANOR ASSOCIATES, BAY MANAGEMENT CORPORATION, MARVIN S. GOLD,

ANNETTE E.P. GOLD, MILTON A. BERNBLUM, JOHN J. GROVES, and BURTON LEVY, individually and as general partners in Branford Manor Associates,
Respondents.

MERRY ELLEN GRUNDMAN, individually and on behalf of all others similarly situated,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his capacity as Secretary of the U.S. Department of Housing and Urban Development; JOHN ERRICHETTI, individually and in his capacity as owner of Highwood Apartments; CREATIVE MANAGEMENT & REALTY, A Connecticut Corporation,
Respondents.

JOANN JOHNSON and FRANK JOHNSON, individually and on behalf of all others similarly situated,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his capacity as Secretary, U.S. Department of Housing and Urban Development; WILLIAM H. HERNANDEZ, JR., individually and in his capacity as Manager for Connecticut for the U.S. Department of Housing and Urban Development and RIPPS REALTY, INC.,
Respondents.

MAY PLEASANT, individually and on behalf of others similarly situated;

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Petitioners,

v.

SAMUEL R. PIERCE, JR., Secretary of the U.S Department of Housing and Urban Development; TUSCAN BROTHERHOOD HOMES, INC., A Connecticut corporation,
Respondents.

PANTALEON MORALES, YLDA LADSON and MARGARET WILLIAMS, individually and on behalf of those similarly situated;

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his capacity as Secretary of the U.S. Department of Housing and Urban Development; WILLIAM H. HERNANDEZ, JR., individually and in his capacity as Manager for Connecticut for the U.S. Department of Housing and Urban Development; CANTERBURY GARDENS COOPERATIVE, INC. and RIPPS REALTY, INC.,
Respondents.

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VERNICE DUBOSE, ET AL.,
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v.

SAMUEL R. PIERCE, JR., SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Vernice Dubose, individually and on behalf of others similarly situated, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 14, 1985.

OPINION BELOW

The opinion of the Court of Appeals is reported at 761 F.2d 913. The opinion of the District Court for the District of Connecticut is reported at 579 F. Supp. 937. Copies of both opinions appear in the separate Appendix along with copies of the five other reported District Court opinions in this case.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 14, 1985, reversing the judgment of the District Court dated February 7, 1984. The Court of Appeals denied a timely petition for rehearing on June 25, 1985. This petition for certiorari was therefore due on September 23, 1985 and was filed within the required time. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

United States Code, Title 12, §1715z-1(f)(3) and (g), the Operating Subsidy Legislation; and United States Code, Title 28, §2412, The Equal Access to Justice Act. As both provisions involved are lengthy, they are set forth verbatim in the separate Appendix.

STATEMENT OF THE CASE

This petition arises from the totally successful enforcement by lower income tenants of a Congressional program to provide special rental subsidy payments to inhabitants of federally subsidized housing projects. Petitioners seek review of reversal by the Court of Appeals for the Second Circuit of the trial court's award to them of $141,705 in attorney's fees under the Equal Access to Justice Act (EAJA), 24 U.S. Code §2412, Appendix V, p. 193.

On its merits, this case concerned the Section 236 housing program. 12 U.S.C. §1715z-1. Section 236 provides for mortgage insurance and interest reduction payments to private apartment project owners. In return, owners must rent primarily to lower income persons and families at reduced rates controlled by HUD. 12 U.S.C. §1715z-1(i)(2).

In 1974, in response to rapidly escalating Section 236 rents caused primarily by increased energy costs, Congress enacted the operating subsidy program, 12 U.S.C. §1715z-1(f)(3) and (g), (1976 ed.). Appendix V, p. 190. Claiming that the new statute gave HUD absolute discretion whether to implement the operating subsidy program at all, the Secretary refused to aid the lower income tenants.

In response to rent increase requests by owners of their projects, suits against HUD were filed in Maryland and Pennsylvania by Section 236 tenants seeking operating subsidies. Both courts ordered HUD to pay the subsidies. *Harrison v. Hills*, Civil No. 75-938 (W. D. Pa. Oct. 1, 1975); *Ross v. Community Services, Inc.*, 396 F. Supp. 278 (D. Md. 1975).

Soon thereafter, the United States District Court for the District of Connecticut issued a preliminary injunction against HUD. *Dubose v. Hills*, 405 F. Supp. 1277 (D. Conn. 1975), Appendix II, p. 75. Jurisdiction for this lawsuit was held to be properly founded upon 28 U.S. Code §§1337 and 1361. *Dubose v. Hills, supra*, 405 F. Supp. 1279-80. Appendix II, p. 76.

Though HUD proceeded to pay subsidies to tenants of the three projects then involved in *Dubose*, it continued to refuse to implement the program in Connecticut. On May 26, 1976, the district court issued a statewide injunction in behalf of lower income tenants residing in all 101 Connecticut Section 236 projects. *Dubose v. Hills*, 22 F.R. Serv. 2d 476 (D. Conn. 1976), Appendix II, p. 159. HUD appealed this statewide injunction to the Second Circuit which denied stays on June 28 and July 20, 1976. *Dubose v. Harris*, 434 F. Supp. 227, 229 (D. Conn. 1976), Appendix II, p. 153.

Meanwhile, several other U.S. district courts and two courts of appeal also rejected HUD's argument and issued or affirmed injunctions ordering HUD to pay. *Dubose v. Harris*, 82 F.R.D. 582, 585, n.12 (D. Conn. 1979), Appendix II, p. 144. Despite this flood of authority against HUD, plaintiffs nationwide and their attorneys still were left to attack HUD's intransigence piecemeal. Finally, a nationwide class action was filed and won. *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976). Already ongoing operating subsidy cases like *Dubose* were not subsumed within the nationwide class action.

For unstated reasons, the Supreme Court on October 18, 1976 stayed the order in the nationwide class action. *Hills v. Underwood*, 429 U.S. 892 (1976). Thereafter, also absent comment, this Court granted certiorari in two other similar cases. *Harris v. Ross*, 431 U.S. 928 (1977); *Harris v. Abrams*, 431 U.S. 928 (1977). The Second Circuit then followed the Supreme Court and stayed the district court's statewide injunctive order in this case. *Dubose v. Hills*, Nos. 76-8311 and 76-6107 (2d Cir. Dec. 27, 1976), Appendix II, p. 173. This Court declined to vacate the stay on February 22, 1977. 429 U.S. 1085 (1977).

Shortly thereafter, HUD and counsel in this case and the other three principal cases nationwide, *Underwood*, *Ross* and *Abrams*, initiated settlement negotiations. This resulted in a nationwide Settlement Agreement and Stipulation for Settlement. *Dubose v. Harris*, 82 F.R.D. 582, 592 (D. Conn. 1979),

Appendix II, p. 117. In approving the agreement, the District Court exclaimed, *inter alia*, that, ". . . it is extraordinary that [the tenants] have been able to procure this settlement." *Dubose v. Harris, supra*, 82 F.R.D. 589, Appendix II, p. 113. The exact same agreement approved in *Dubose* also governed the final outcomes of *Underwood, Ross* and *Abrams*.

While administration of the sixty million dollar nationwide settlement fund proceeded, plaintiffs in this case and in *Underwood* filed applications for attorney's fees under the EAJA. In the nationwide class action, one of the three other cases settled along with this one, the California district court awarded EAJA counsel fees to the plaintiffs. *Underwood v. Pierce*, 547 F. Supp. 256 (C.D. Cal. 1982). HUD appealed that fee determination to the Ninth Circuit Court of Appeals.

On February 7, 1984, the district court in this case issued its decision holding that petitioners were entitled to an award of fees totalling $141,705. *Dubose v. Pierce, supra*, 579 F. Supp. 937. (D. Conn. 1984), Appendix II, p. 20. The Secretary of HUD then appealed the trial court's fee award to the United States Court of Appeals for the Second Circuit.

On May 14, 1985, proceeding as a two judge panel under Second Circuit Rule 0.14, the Second Circuit reversed the district court's award of attorney's fees to petitioners. *Dubose v. Pierce*, 761 F.2d 913 (2d Cir. 1985). Appendix I, p. 2. The panel rejected the district court's finding that HUD's defense of this case on the merits was not "substantially justified" within the meaning of the EAJA. In so doing, it ignored "the unanimous rejection of the Secretary's claims by the federal judiciary." *Dubose v. Harris, supra*, 82 F.R.D. 582, 585, Appendix II, p. 108. The panel also paid short shrift to the settlement of the case in which tenants nationwide ultimately received all they had asked for in their complaints. The Second Circuit relied principally on this Court's issuance of the stay in *Underwood* and writs of certiorari in the *Ross* and *Abrams* cases in reversing the trial court's critical finding that HUD had not carried its burden of proving its position in the case was "substantially justified."

Nine days later, in *Underwood v. Pierce*, 761 F.2d 1342 (9th Cir. 1985), Appendix III, p. 175, the Ninth Circuit affirmed the award of counsel fees to the *Underwood* plaintiffs. The affirmance of the *Underwood* fee decision has created a direct conflict between the Ninth and Second Circuits on the very same general matter and several important legal issues.

Petitioners seek a writ of certiorari so that this Court may resolve this conflict and provide needed clarification of the EAJA. This case presents an opportunity for this Court to insure that the crucial EAJA issue of whether governmental action was "substantially justified" will be determined consistently nationwide.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *UNDERWOOD V. PIERCE* REGARDING PROPER INTERPRETATION OF THE EQUAL ACCESS TO JUSTICE ACT, 28 U.S.C. §2412.

Both the *Dubose v. Pierce* and *Underwood v. Pierce* appeals were filed by HUD from adverse district court decisions awarding substantial attorney's fees to counsel for low income tenants under the EAJA. *Dubose* and *Underwood* were the most important of a series of suits filed nationally successfully challenging HUD's refusal to implement the Congressionally mandated operating subsidy. *Dubose* and *Underwood* were resolved together pursuant to the same sixty million dollar nationwide settlement. *Dubose* and *Underwood* involved identical issues of law and fact concerning HUD's illegal action.

In *Underwood*, the Ninth Circuit affirmed an award of attorney's fees holding that HUD's position was not "substantially justified" while the Second Circuit reversed the award of fees in this case. This conflict justifies the grant of certiorari to review the judgment below. ". . . [I]t is only the Supreme Court of the United States that can speak with authority to assure uniformity of federal law among the several circuits and districts." *United States v. R.J. Reynolds Tobacco Co.*, 416 F. Supp. 316, 320 (D.N.J. 1976)

2. THIS CONFLICT BETWEEN THE NINTH AND SECOND CIRCUITS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The EAJA is one of perhaps the two most significant federal attorney's fee shifting statutes, the other being the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S. Code §1988. The EAJA is so important in the Second Circuit that the court of

appeals has promulgated a special rule for petitioning for EAJA fees. Second Circuit Rule §0.25. The EAJA was recently reenacted and signed into law by the President on August 5, 1985. Equal Access to Justice Act, P.L.99-80.

Under the EAJA, 28 U.S. Code §2412(d)(1)(A), parties who prevail in civil suits against the federal government are entitled to counsel fees ". . . unless the court finds that the position of the United States was substantially justified . . ." The trial court found that HUD's position was not "substantially justified." The Second Circuit disagreed. In *Underwood*, the Ninth Circuit agreed with the trial court.

This conflict between the Second and Ninth Circuits is indicative of the disagreement among courts nationwide regarding the precise standards they should employ in determining whether government action is "substantially justified." In *Spencer v. N.L.R.B.*, 712 F.2d 539, 546 (D.C. Cir. 1983), the court of appeals noted that: "Because of its recent vintage, [the EAJA] has not yet acquired a discernible gloss of judicial interpretation. And, most importantly, several of its crucial terms are distressingly ambiguous. [T]wo of those terms – 'the position of the United States' and 'substantially justified' – loom large . . ." Petitioners suggest that this disagreement and ambiguity amount to . . . "an important question of federal law which has not been, but should be, settled by this Court . . ." Rules of the Supreme Court of the United States, Rule 17.1(c).

The conflict between *Dubose* and *Underwood* is not limited to their results. To arrive at those results, the Second Circuit and Ninth Circuits each used a distinctly different set of standards to determine whether HUD's position on the merits was "substantially justified." This Court needs to set forth a single set of standards for determining issues arising under the phrase in question so that future resolutions of EAJA controversies will be handled uniformly nationwide. This Court could meet that need by reviewing this case.

For example, the *Underwood* court of appeals held that "We review, for an abuse of discretion, the district court's determination that the government's position was not substantially justified." *Underwood v. Pierce, supra*, 761 F.2d 1346. Appendix III, p. 181. The Second Circuit, on the other hand, held that . . . "the district court's determination that HUD's position was not plausible should be viewed as a conclusion of law . . . and subject to *de novo* review." *Dubose v. Pierce, supra*, 761 F.2d 917. Appendix I, p. 11.

Also, the *Underwood* court of appeals concluded that prior adverse decisions from other courts in other jurisdictions on the same legal issue must bear heavily against the government's claim that its position was substantially justified. At 761 F.2d 1346, the Ninth Circuit noted that:

> Numerous courts in different districts had agreed with the tenants' contentions. The Secretary was thus put on notice that his position was without legal basis, but he continued to litigate the issue. (Appendix III, p. 181).

The Second Circuit, on the other hand, lightly dismissed those prior decisions as practically irrelevant:

> Although HUD's position became more questionable as adverse trial and appeal decisions accumulated, we cannot say that the tally ever became so one-sided as to render HUD's position clearly unjustifiable. *Dubose v. Pierce, supra*, 761 F.2d 918. (Appendix I, p. 14).

The Second Circuit even suggested that Second Circuit precedent against HUD's stance on the merits would not have caused it to conclude that the government's position was not "substantially justified," citing *Wyandotte Savings Bank v. N.L.R.B.*, 682 F.2d 119, 120 (6th Cir. 1982). *Dubose v. Pierce, supra*, 761 F.2d 919, Appendix I, p. 14.

Yet another example of the Second Circuit's conflict with the Ninth concerning the "substantially justified" review should be of special interest to this Court. While the Ninth Circuit dismissed this Court's entry of the stay in *Underwood* and grants of

certiorari in *Ross* and *Abrams* as having little or no bearing on the "substantially justified" question, the *Dubose* court seized on these events as a principal basis for concluding that HUD's position was "substantially justified." *Underwood v. Pierce, supra*, 761 F.2d 1346; Appendix III, p. 181. *Dubose v. Pierce, supra*, 761 F. 2d 919-20. Appendix I, p. 16.

Unless this case is reconsidered, a Supreme Court stay or writ of certiorari will act as an absolute bar to EAJA liability for attorney's fees in the Second Circuit. This same interpretation is possible in all other circuits but the Ninth because of its *Underwood* decision.

Petitioners are not aware of any definitive standard established by the Supreme Court for the granting of stays or certiorari that, in the absence of a written decision, would enable a lower court to discern the underlying reason(s) for the Court's action.

The Supreme Court's review of cases on *certiorari* "is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Taking a factor into account does not constitute a controlling basis for determination.

This Court's written decisions on stays indicate that different standards are applied to different situations. *See, e.g., Heckler v. Blankenship*, _____ U.S. _____, 79 L. Ed. 2d 155, 157 (O'Connor, Circuit Justice, 1984) (granting stay); *M.I.C. Limited v. Bedford Township*, _____ U.S. _____, 77 L. Ed. 2d 1442 (Brennan, Circuit Justice, 1983) (granting stay); "Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a Court of Appeals would be to protect this Court's power to entertain a petition for *certiorari*." *New York v. Kleppe*, 429 U.S. 1307, 1311 (Marshall, Circuit Justice, 1976).

The Second Circuit decision in this case is a departure from the accepted practice of not reading motives into the Supreme Court's issuance of stays and grants of certiorari. This petition presents an opportunity for this Court to establish what if any

precedential value is to be given to its action in issuing a stay or granting certiorari without written opinion and thus avoid the confusion and unnecessary litigation that could result from the assignment of motives and precedent to Supreme Court stays and grants of writs of certiorari.

The *Underwood* court of appeals gave substantial weight to the settlement of the cases in affirming the district court's decision that HUD's position was not "substantially justified":

> "We also note that the Secretary's insistence that the Court's [stay and certiorari] orders justified his position is undermined by the fact that, following entry of those orders, he entered into a settlement agreement granting the plaintiffs all the relief they had requested."
>
> *Underwood v. Pierce, supra,* 761 F.2d 1346. Appendix III, p. 182.

The *Dubose* court of appeals took a directly opposite stance:

> "Nor does the court's suggestion that the government's participation in the settlement represented an admission that the litigation was unjustified merit much analysis."
>
> *Dubose v. Pierce, supra,* 761 F.2d 920. Appendix I, p. 17.

Petitioners emphasize that this settlement was no compromise. Plaintiffs in the district court achieved total victory through the 60 million dollar agreement. In *Spencer v. N.L.R.B., supra,* 712 F.2d 555, n.58, the District of Columbia Court of Appeals concluded that:

> It seems clear that, if the government does not immediately accede to the plaintiff's demand, but instead initially opposes his claims and then at some later stage . . . surrenders, the United States will be liable for attorney's fees . . . For strong indications of

> Congress' intent that fees be awarded under these circumstances, see H.R. Rep. No. 1418, [96th Cong., 2d Sess.] at 11.

This maxim was ignored by the Second Circuit. The intent of Congress was unfulfilled. This Court should review this case so that Congressional intent and proper standards may govern uniformly the determination of attorney's fees under the EAJA.

The "substantially justified" question must be determined on the basis of the entire record or the totality of the circumstances in the case. 24 U.S.C. §2412(d)(1)(B), Appendix V, p. 194. As these circumstances appear, they raise legal issues whose determination by this Court would add needed specificity to the "substantially justified" standard and offer welcome guidance to the federal judiciary. There could not be a more appropriate case for the resolution of such issues of law than this long-term controversy encompassing nearly all imaginable circumstances in which six reported opinions have been authored by the district court. This case is the optimum means for nationwide clarification of the "substantially justified" standard by this Court.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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